No. 03 990 DEC 31 2003

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In The Supreme Court of the United States

DWIGHT FAULK
and
LINDA WILLIAMSON, A.K.A. LINDA WEST,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals violate the principles of *Bruton v. United States* and its progeny in upholding the admissibility of a nontestifying codefendant's unredacted confession which implicates Petitioners by reference to their corporate name?

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OPINIONS AND ORDERS BELOW

The Order of the District Court Directing the Government to Show Cause Re: *Bruton* is set forth in the Appendix at A-32. The Order of the Magistrate Judge Granting Defendants' Motion to Supplement and Denying Defendants' Motion to Sever is set forth in the Appendix at A-33. The Order of the Magistrate Judge Vacating the Previous Order Denying Defendants' Motion to Sever is set forth in the Appendix at A-40. The Order and Recommendation of the Magistrate Judge Granting Defendants' Motions to Supplement and Recommending that Motions to Sever, As Supplemented, Be Denied is set forth in the Appendix at A-41. The District Court Order Denying Defendants' Motion to Exclude *Bruton* Evidence, or in the Alternative, Motion in Limine (as to Faulk) is set forth in the Appendix at A-49. The District Court Order Denying Defendants' Motion to Exclude *Bruton* Evidence, or in the Alternative, Motion in Limine (as to Williamson) is set forth in the Appendix at A-50. The District Court Order Adopting Magistrate's Recommendation to, inter alia, Deny Defendants' Motion to Sever is set forth in the Appendix at A-51. The Order of Magistrate Judge Denying Joint Motion for New Trial Filed by Defendants Faulk and Williamson is set forth in the Appendix at A-52. The District Court Order Adopting Recommendation of the Magistrate (Docket Number 178) and Denying Docket Numbers 165, 166, 167, 168, 174, and 175 is set forth in the Appendix at A-53. The District Court Order Overruling Objections by Faulk and Williamson (Docket Numbers 293 and 295) Re: *Bruton* is set forth in the Appendix at A-55. The District Court's Supplemental Opinion Re: *Bruton* is set forth in the Appendix at A-57.

The published Opinion of the Eleventh Circuit Court of Appeals, *United States v. Williamson*, 339 F.3d 1295 (11th Cir. 2003), affirming the Defendants' convictions is set forth in the Appendix at A-1. The Order of the Eleventh Circuit Denying

Defendants' Petition for Rehearing and Petition(s) for Rehearing En Banc is set forth in the Appendix at A-28. The Order of the Court of Appeals granting the stay of the mandate to file a Petition for Writ of Certiorari, dated October 21, 2003 is set forth in the Appendix at A-30.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Order of the United States Court of Appeals for the Eleventh Circuit Denying Defendants' Petition for Rehearing and Petitioner(s) for Rehearing En Banc was entered on October 3, 2003. The Eleventh Circuit's Opinion affirming defendants' convictions was entered on July 30, 2003.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> **Amendment VI. Jury trials for crimes, and procedural rights**
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]

STATEMENT OF THE CASE

Proceedings Below

On June 27, 2001, the Petitioners, Dwight Faulk and Linda Williamson, along with codefendants Jennifer McKee and Brian McKee, were charged in a 31-count indictment with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (Count 1), mail fraud in violation of 18 U.S.C. § 1341 (Counts

2-18), conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count 19), and money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(I) (Counts 20-31). Following a joint jury trial, Faulk, Williamson, and Brian McKee were found guilty on all charges. Jennifer McKee was found guilty for violation of 18 U.S.C. § 371, conspiracy to commit mail fraud. All defendants timely appealed their convictions.

On appeal, in addition to other issues, Faulk and Wiliamson challenged the sufficiency of the evidence against them, and the District Court's admission of nontestifying codefendant Brian McKee's inculpatory statements to law enforcement personnel pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). On July 30, 2003, the Eleventh Circuit affirmed petitioners' convictions. *See United States v. Williamson*, 339 F.3d 1295 (11th Cir.), *reh'g and reh'g en banc denied*, No. 02-12765 (11th Cir. 2003). Rehearing was denied on October 3, 2003. *See id.*

Statement Of Facts

The gist of the charges against defendants was the use of the mail to fraudulently obtain a discount on the dumpage fee charged to Big Wheel Recycling Company ("Big Wheel") for use of the sanitary landfill in Etowah County, Alabama. (R. 1-2, 3-9, 10.) Etowah County Solid Waste Authority (the "Authority") operated a transfer station and a landfill near Gadsden, Alabama. (R. 15-97-99; R. 16-134 through -135; R. 18-136 through -137.) The transfer station received household garbage and lost money for the Authority. The landfill operation received "construction and demolition" or simply C&D material at a profit. (R. 16-158 through -159, -167, -168.) If the Authority could increase its landfill usage through C&D yet minimize the intake of household garbage, it could increase its profits, pay its debts, and maintain its level of employees and benefits to the community. (R. 16-158 through

-159, -167 through -168, -252 through -254; R. 18-276 through -287; R. 28-193 through -194, -197, -203 through -205.)

The Authority passed a resolution to induce recycling companies doing business in Etowah County to receive a 50% discount from the dumping (tippage) fees for C&D materials. No rate-per-ton was ever mentioned. (R. 18-264 through -265; R. 23-94 through -105; R. 15-108 through -109.) Dwight Faulk and Linda West-Williamson formed Big Wheel Recycling, Inc. Mrs. Williamson, also known as Linda West among her family and friends, owned 97% of the stock, and Judge Faulk's children owned the rest. (R. 16-111 through -121.)

The central theme of the Government's case against Petitioners was that they formed a corporation, Big Wheel, which was not a recycling company, but fraudulently obtained the discounted rate for Big Wheel to be charged for dumping of materials in the landfill. *United States v. Williamson*, 339 F.2d at 1299 n.7. The Government theorized that the Petitioners impermissibly received the discounted dumping rates through the assistance of codefendant Brian McKee, the Solid Waste Administrator for the Authority, who they paid directly or indirectly by place McKee's wife, Jennifer, on the payroll without requiring more than nominal services. *Id.* at 1299.

At trial, a key issue was whether Big Wheel qualified as a local recycling company so as to be entitled to the 50% discount. The Petitioners presented expert witnesses and other evidence to support their claim that Big Wheel qualified for the discount as a recycling company. (R. 23-10 through -80.) The Government countered with its own expert witnesses. Big Wheel considered itself a recycling company. It required source separation of household garbage from C&D material by placing receptacle specifically designed to gather household waste in each mobile home plant. Big Wheel then placed separate pans for the receipt of C&D material. At the

landfill, drivers further recycled by removing sheet metal, steel girders, two-by-fours, plumbing fixtures, and equipment. (R. 23-274 through -287, -289 through -296, -297 through -308; R. 19-239 through -253.) Meanwhile, the Authority's bottom line went from a deficit of $778,347 in 1994, to a profit of $122,882 in 1998. (R. 23-192 through -193.) The Authority praised the 50% reduction factor. (DX-16) (R. 23-179, -180, -181, -194.)

The billing operation used by Big Wheel and the Authority was simple. A driver went to a mobile home plant, retrieved a pan of C&D material, and weighed it at the landfill. Tickets were entered in the computer at the weight site in the name of the mobile home manufacturer which indicated the solid waste came from out of the county. A copy of the ticket would be transmitted via e-mail to the downtown office of the Authority. The bookkeepers for the Authority generated an invoice to Big Wheel using the weights and rate-per-ton for the disposal in the landfill. (R. 15-97 through -99.)

Since Big Wheel qualified as a local recycling company, the initial invoice was reduced by 50% before being mailed to Big Wheel. Big Wheel received the invoices in its Luverne officer. (R. 24-19.) The billing to the mobile home plants was based on a price negotiated between Big Wheel and the mobile home plants. The payment to the Authority was based upon the 50% discount received by Big Wheel as a recycling company doing business in Etowah County. (R. 16-243 through -253.)

All billing to the mobile plants was documented by Big Wheel. All billing received from the Authority was documented. No cash was used in any transaction. Big Wheel conducted all of its business in local banks through checks received by mobile home manufacturers and, in turn, issued to the Authority. (R. 16-243 through -253.) All funds were deposited in the bank, and checks were properly drawn on

these accounts.

A dispute arose in 1999 over the amount owed to the Authority by Big Wheel. Some of the Board members decided that Big Wheel should not be receiving the 50% discount and doubled the amount of invoices to Big Wheel. The Board entered into a compromise, release, and settlement on the disputed claim. (R. 19-9 through -11.) The Authority then resumed operations with Big Wheel at a negotiated rate. (R. 19-10 through -11.)

By year 2000, the cash flow and profits of the Authority had begun to slide. Travel and other expenses accelerated out of control. The Authority received bad publicity. (R. 19-13.) At least three Board members also served as mayors of nearby cities. They were becoming politically embarrassed. (R. 19-13.) The finances of the Authority were audited by the Alabama Department of Public Accounts. (R. 16-55.) The audit reflected a material deficit in operations and criticized the 50% discount being received by Big Wheel. (R. 20-34 through -58.) Board members immediately adopted the audit's theme that all of their financial woes lay at the feet of Big Wheel. (R. 19-12 through -13.) They denied any knowledge of the 50% discount. (R. 18-244, -271.)

The Board's finger pointing started a criminal investigation which led to the questioning of Judge Faulk and Linda Williamson. Linda Williamson cooperated and answered each and every question asked of her on three separate occasions. (R. 13-13 through -34.) Likewise, Judge Faulk cooperated and answered the agents' questions. He advised them that he actually ran Big Wheel and that he had formed the company to assist the Authority in acquiring solid waste from mobile home manufacturers for disposal in their landfill. He explained that in order to be competitive and get their business he had to have a reduction in the Authority's tippage fee (rates). (R. 20-147 through -151.)

Brian McKee was also questioned on several occasions. After being intimidated and threatened by imprisonment of his wife, Jennifer, Brian McKee gave incriminating statements to authorities which were admitted at trial. Over objection of the Petitioners, the Government introduced through the testimony of Special Agent Keith Baker the admissions of Brian McKee wherein he indicated that "he was being paid because of his having gotten the recycling resolution passed and for giving Big Wheel the discounted rate of $8.75 a ton for dumping debris at the Etowah Solid Waste Disposal Authority." (R. 28-198 through -199; R. 13-99 through -101; R. 19-154 through -155.) McKee added that he knew what he was doing was illegal. (R. 19-154 through -155.) This postconspiratorial statement clearly and directly implicates Dwight Faulk and Linda Williamson as CEO and owners of Big Wheel. It was a direct statement that Big Wheel had apparently paid him under the table to obtain favorable discount rates for Big Wheel's use of the Authority's landfill. (R. 20-147 through -151, -152, -154, -155.) McKee did not testify.

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT VIOLATED THE PRINCIPLES SET FORTH IN *BRUTON V. UNITED STATES* AND ITS PROGENY, AND THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO RECTIFY THE APPELLATE COURT'S FUNDAMENTAL ERROR AND PROVIDE NEEDED GUIDANCE AND CLARIFICATION TO LOWER COURTS IN THIS CRITICAL AREA.

The constitutional principles applicable to the admissibility of a nontestifying codefendant's confession announced by this Court in the seminal case of *Bruton v.*

United States, 391 U.S. 123 (1968), as elucidated upon in *Richardson v. Marsh*, 481 U.S. 200 (1987), and most recently, in *Gray v. Maryland*, 523 U.S. 185 (1998), have been violated in a fundamental way in the present case. The Eleventh Circuit's opinion upholding the admissibility of codefendant McKee's confession misconstrues *Richardson* and *Gray* and, if allowed to stand, would seriously undermine this Court's holdings in an important area of constitutional law. This case gives the Court the opportunity to rectify the Eleventh Circuit's prejudicial constitutional error and provide guidance for the lower courts in this critical area.

The Eleventh Circuit rejected Petitioners' *Bruton* claim, relying on *Richardson v. Marsh*, which "authorized the admission of a nontestifying codefendant's confession where such confession omitted reference to the defendant and was coupled with a limiting instruction." *United States v. Williamson*, 339 F. 3d 1295, 1303 (11th Cir.), *reh'g denied, reh'g en banc denied*, No. 02-12765 (11th Cir. 2003). The Eleventh Circuit "failed[ed] to see how the statement of Brian McKee implicates, directly or otherwise, Faulk or Williamson. . . . Brian McKee's statement reflects only that he was paid to pass the recycling resolution and give BWRI [Big Wheel] a discounted dumping rate. The statement, as quoted above, does not facially implicate Faulk or Williamson as was the case with the confession the Supreme Court addressed in *Bruton*, nor was the statement 'obviously redacted' as was the case in *Gray*. The statement itself is silent as to who paid Brian McKee." 339 F.3d at 1303. The Eleventh Circuit continued:

> Furthermore, even assuming that it is self-evident that BWRI was paying Brian McKee for passing the resolution and giving the discounted rate, naming BWRI does not facially implicate either Faulk or Williamson. In order to make that inferential link, additional, independent evidence is needed.

> Simply because the Government provided the jurors with the independent evidence needed to make that link does not create a *Bruton* violation. What the Government accomplished in this case is what the Supreme Court specifically authorized in *Richardson*.

Id. at 1303-04 (footnote omitted). The Court noted that by its conclusion it did not mean to suggest that

> Brian McKee's statement did not potentially inculpate Faulk or Williamson. Rather, consistent with the Supreme Court's decision in *Richardson*, we simply conclude that the jury could follow the court's limiting instructions and limit the use of such statements to the proper defendant.

Id. at 1303 n.16.

The Eleventh Circuit's holding seriously misconstrues *Bruton*, *Richardson*, and *Gray*. In *Bruton v. United States*, the Supreme Court held that the introduction of a nontestifying codefendant's confession implicating the defendant violated the accused's right to confront witnesses secured by the Confrontation Clause of the Sixth Amendment. The Court also expressed doubt about the remedial effect of a curative instruction directing the jury that it should consider the codefendant's confession solely in consideration of the codefendant's guilt and disregard it with respect to the defendant. The Court concluded that "where the powerfully incriminating extra-judicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial," limiting instructions by the court will not suffice to eliminate the prejudicial effect of the introduction of such statements. 391 U.S. at 135-36.

In *Richardson v. Marsh*, the Court limited *Bruton*'s scope. In *Richardson*, the codefendant's confession did not facially incriminate the defendant, as it had been redacted to omit any reference to the defendant. The Court recognized the difference between the case before it and *Bruton*: where *Bruton* involved a confession that was unredacted and facially incriminated a defendant, in *Richardson*, nothing in the confession even alluded to the defendant's existence. It was only through other evidence introduced by the defendant that she was linked to the confession. *See* 481 U.S. at 203-04. Holding that no violation occurred, the Court intimated that the proper inquiry in considering *Bruton* issues was whether a codefendant's confession incriminated a defendant on its face. *See id.* at 211.

Most recently, in *Gray v. Maryland*, the Court held that the confession which substituted "blanks" and the word "delete" for the defendant's name in a codefendant's confession, violated *Bruton*. The Court backed away from a narrow, "four-corners" analysis. *See* 523 U.S. at 195-96. The Court acknowledged that *Richardson* appeared to place "outside the scope of *Bruton*'s rule those statements that incriminate inferentially," and that "the jury must use inference to connect the statement in this redacted confession with the defendant." *Id.* at 195. However, as further stated by the Court:

> [I]nference pure and simple cannot make the critical difference, for if it did, then [*Richardson*] would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, descriptions as unique as the red-haired, bearded, one-eyed man-with-a-limp, and perhaps even full names of defendants who are always known by a nickname.

Id. (citation omitted; internal quotations omitted). *Richardson*

did not indicate that inference itself is the critical point; rather, the court is directed to consider "the *kind* of, not the simple *fact* of, inference." *Id.* at 196 (emphasis in original). If the redacted confession still leads the jury, making ordinary inferences, directly to the defendant, a *Bruton* violation has occurred. *See id.*

In this case, codefendant Brian McKee's confession admitted at trial was unredacted and specifically named Big Wheel; and, further, in it McKee acknowledged that he knew what he was doing was illegal. This confession clearly falls within the kind covered by *Bruton* and *Gray*, rather than by *Richardson*.

Big Wheel is a company name and is synonymous with Faulk and Williamson, the owners and principals of Big Wheel. The Government in its opening argument meticulously explained how Linda Williamson and Dwight Faulk were one and the same as Big Wheel. (R. 15-15, -16.) Corporate records and documents indicated that appellant Williamson owned 98% of the stock of Big Wheel and defendant Faulk ran Big Wheel as its CEO. (Gov. Ex. 14.) The Government expressly identified Big Wheel Recycling, Inc., as being owned and operated by Faulk and Williamson. (R. 15-19 through -20.) Exhibits indicated that Williamson owned 97% of the stock of Big Wheel. (Gov. Ex. 14.) The admission of Faulk and Williamson's statement identified Faulk as the executive who ran Big Wheel and Williamson as the owner and bookkeeper of Big Wheel. (R. 20-147 through -152.) The Government's Opening Statement clearly argues that Big Wheel Recycling is Linda Williamson and Dwight Faulk. (R. 15-15, -16.) The Government's evidence at trial, through FBI Agent Baker, clearly stated that Dwight Faulk controlled all activities of Big Wheel and served as its CEO. (R. 19-154 through -155.) The Government introduced Big Wheel's Articles of Incorporation, which revealed that Linda West Williamson owned 97% of the stock. (Gov. Ex. 14.)

In final argument, the Government argued the postconspiratorial statement against Faulk and Williamson. First, the Prosecutor stated that codefendant McKee admitted he got paid for giving Big Wheel a special rate and that he knew his actions were illegal. (R. 25-94.) The Government then argued that Dwight Faulk formed Big Wheel (R. 25-104), signed as CEO of Big Wheel (R. 25-106), and "made all the important decisions for the company." (R. 25-106.) He then argued that Ms. Williamson owned 998 of the 1,000 shares of Big Wheel. (R. 25-106; R. 16-120; Gov. Ex. 14.) By arguing that McKee received illegal payments from Big Wheel, in return for a favorable rate, the Government argued that Faulk and Williamson made the payments which were characterized as illegal. Thus, by implicating Big Wheel, the codefendant's postconspiratorial statements directly implicated Faulk and Williamson in violation of their rights under the confrontation clause.

By its naming of Big Wheel, the confession in this case is no different than ones that use "shortened first names, nicknames, descriptions as unique as the red-haired, bearded, one-eyed man with a limp, and perhaps even full names of defendants who are always known by a nickname. *Gray v. Maryland*, 523 U.S. at 195. Such confessions fall inside, not outside, *Bruton's* protection. *Gray v. Maryland*. The only inference necessary for the jury to have made in this case was a simple one leading directly to the Petitioners; and this was clearly pointed out and argued by the prosecution at trial. *See id.* The prosecution used McKee's confession to convict Faulk and Williamson.

The Eleventh Circuit's holding in this case misapplies this Court's rulings and is in conflict with other opinions from the Eleventh, as well as other circuits. *See, e.g., United States v. Doherty*, 233 F.3d 1275 (11th Cir. 2000) (where, in codefendant's confession, he admitted he knew what he was doing was illegal and identified defendant as the individual giving him

instructions, the admission of the confession constituted prejudicial error under *Bruton*); *United States v. Gonzalez*, 183 F.3d 1315 (11th Cir. 1999) (redacted statement that identified coparticipant as a "Colombian" and gave a description, violated *Bruton* and *Gray*), *cert. denied*, 528 U.S. 1144 (2000); *United States v. Petit*, 841 F.2d 1546, 1555-56 (11th Cir.) (statement referring to a "friend" who had supplied the warehouse violated *Bruton* because, given the evidence in the record, the jury could only have understood defendant to be the "friend" identified in the statement), *cert. denied*, 487 U.S. 1237 (1988); *United States v. Bennett*, 848 F.2d 1134, 1141-42 (11th Cir. 1988) (statement referring to the "vessel where *they* unloaded the cocaine from" and the "boat *they* were on" violated *Bruton* because the references to "they" clearly referred to the other two defendants; in reaching this conclusion, the court noted that the prosecutor had expressly made this connection in his opening statement and in his closing argument); *United States v. Van Hemelryck*, 945 F.2d 1493, 1502 (11th Cir. 1991) (*Bruton* violated where record presented no possible person other than the defendant who could have been "the other person" and "the man" referred to in a codefendant's statement; and Government directly linked the statement and defendant in it's rebuttal closing); *United States v. Richards*, 241 F.3d 335, 341 (3d Cir.) (codefendant's reference to his "friend" was just as blatant and incriminating of defendant as the word "deleted" was in *Gray* case), *cert. denied*, 533 U.S. 960 (2001); *United States v. Gillam*, 167 F.3d 1273, 1277 (9th Cir.) (replacing defendant's name with "someone who worked at the F.D.A. . . . who was getting ready to retire" not only made it clear that the codefendant was pointing at someone else but left little doubt for the jury that it was the other codefendant), *cert. denied*, 528 U.S. 900 (1999).

This case clearly falls within the holdings of *Bruton* and *Gray* rather than *Richardson*. The confession named and implicated Big Wheel which could only be understood as

referring specifically to Faulk and Williamson, and the Government strongly argued that the jury should see Big Wheel as synonymous with Faulk and Williamson. The confession facially incriminated Faulk and Williamson and its admission into evidence. This violated *Bruton* and *Gray*. Moreover, the erroneous admission of the confession was not harmless. A *Bruton* error is harmless only if the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the codefendant's statement so insignificant, that beyond any reasonable doubt the improper use of the statement was harmless. *United States v. Doherty*, 233 F.3d at 1282; *see Chapman v. California*, 386 U.S. 18 (1967).

In this case, the evidence against Petitioners was far from overwhelming. Whether Big Wheel qualified for the discounted rate was a hotly contested issue. Indeed, Petitioners argued below that the evidence was insufficient to support their convictions. At the same time, McKee's confession had to have a profound effect on the jury. As recognized by *Bruton* and it's progeny, such incriminating evidence is "difficult to thrust out of mind." *Richardson v. Marsh*, 481 U.S. at 208. The jury can not possibly be expected to forget it in assessing the defendant's guilt. *United States v. Doherty; see Bruton v. United States*. Therefore, the admission of McKee's statement constituted prejudicial error. Accordingly, this Court must review this matter to prevent injustice to Petitioners and, also, to provide needed guidance to the lower courts.

CONCLUSION

For all the foregoing reasons, the Petitioners, Dwight Faulk and Linda Williamson, request this Court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

DWIGHT FAULK
and
LINDA WILLIAMSON, A.K.A. LINDA WEST,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LINDA WILLIAMSON, A.K.A. LINDA WEST, DWIGHT FAULK, et al.,
Defendants-Appellants.

No. 02-12765.

United States Court of Appeals,
Eleventh Circuit.

July 30, 2003.

Defendants were convicted of conspiracy to commit mail fraud, mail fraud, conspiracy to commit money laundering, and money laundering by the United States District Court for the Middle District of Alabama, No. 01-00106-CR-N, Myron H. Thompson, J., and they appealed. The Court of Appeals held that: (1) evidence that administrator for solid waste disposal authority, knowing that company for which his wife worked was not recycling company, had conspired with company's principals, in return for kickbacks routed through his wife, to give company a discounted rate available only to recyclers for waste that it dumped at landfill, was sufficient to support mail fraud and conspiracy to commit mail fraud convictions; (2) evidence that defendants had deposited and cashed checks which represented the proceeds of their mail fraud conspiracy was sufficient to sustain conviction for promotional money laundering; and (3) post-arrest statement made by administrator, acknowledging that he had been paid for arranging for company to receive this special rate, did not facially implicate his alleged co-conspirators as parties making payments and did not violate co-conspirators' *Bruton*

confrontation rights.

Affirmed.

Dowd, District Judge, sitting by designation, concurred in part and dissented in part and filed opinion.

Gregory M. Biggs, Montgomery, AL, George L. Beck, Jr., Beck & Byrne, P.C., David B. Byrne, Jr., Capell & Howard, Montgomery, AL, John D. Floyd, Jack Floyd, Floyd, Floyd & Floyd, Gadsden, AL, for Defendants-Appellants.

Verne H. Speirs, Montgomery, AL, for Plaintiff-Appellee.

Appeals from the United States District Court for the Middle District of Alabama.

Before DUBINA and FAY, Circuit Judges, and DOWD,* District Judge.

PER CURIAM:

On June 27, 2001, a federal grand jury returned a thirty-one count indictment against Defendants-Appellants Dwight Faulk ("Faulk"), Linda Williamson ("Williamson"), and Brian and Jennifer McKee for conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (Count 1), mail fraud in violation of 18 U.S.C. § 1341 (Counts 2-18), conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count 19), and money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(I) (Counts 20-31). Following a joint jury trial, Faulk, Williamson and Brian McKee were found guilty on all

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*Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

charges. Jennifer McKee was found guilty for violation of 18 U.S.C. § 371, conspiracy to commit mail fraud. The Appellants timely appealed their convictions.

In this appeal, the Appellants challenge the sufficiency of the evidence against them, and challenge the District Court's admission of non-testifying codefendant Brian McKee's inculpatory statements to law enforcement personnel pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).[1] After consideration of the parties' briefs and oral argument as well as an independent review of the entire record of trial, we conclude that there exists a sufficient legal basis for a reasonable jury to have convicted the Appellants, and that the district court did not err in admitting Brian McKee's statements.

I. BACKGROUND

The Etowah Solid Waste Disposal Authority ("ESWDA") was established by the Etowah County Commission in September 1993 for the purpose of operating an inert landfill in Etowah County, Alabama. The ESWDA consisted of a five-member Board of Directors tasked by the Etowah County Commission with the responsibility of overseeing the operation of the landfill.

Because the Etowah County landfill did not meet certain federal and state guidelines, it only accepted disposal of non-putrescible waste such as construction and demolition ("C&D") materials and other inert, non-hazardous items.

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[1]The Appellants raise a host of additional issues for our consideration. Based on a thorough review of the record and consideration of oral argument, we find those issues to be without merit and, therefore, affirm the district court without extended analysis.

Putrescible waste such as household garbage was diverted from the Etowah County landfill to an Etowah County transfer station where, at considerable expense to the ESWDA, it was hauled to an adjacent county for disposal in a landfill that met the pertinent guidelines.

As it turns out, the Etowah County landfill was an extremely profitable venture for the ESWDA. However, the ESWDA was losing significant revenue through the transfer station as a result of having to separate and haul putrescible waste. Accordingly, the ESWDA sought to reduce the amount of putrescible waste entering the transfer station and to maximize the non-putrescible waste entering the Etowah County landfill. To meet this objective, in March 1995, the ESWDA passed two resolutions drafted and presented by Brian McKee, the Solid Waste Administrator for the ESWDA. The first resolution provided for a fifty percent reduction in the dumping fee at the Etowah County landfill to recycling companies located in Etowah County.[2] The second resolution allowed commercial haulers to take advantage of the lower municipal rate provided that a minimum of 2,750 tons of waste were disposed of per month and that the hauler's account with the ESWDA was not past due. In August 1995, Brian McKee introduced and the ESWDA passed a third resolution which altered the 2,570 tons per month requirement for a commercial hauler to receive the municipal dumping

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[2]At the time of the passage of the first resolution, commercial haulers of waste were required to pay a dumping fee of $20.00 per ton for use of the Etowah County landfill. The $20.00 per ton commercial dumping rate was in effect until September 1995, at which time the rate increased to $25.50 per ton. In addition to the commercial hauler rate, there existed a special municipal rate of $17.50 per ton. The municipal rate was also in effect at the time of the passage of the first resolution and at all times pertinent to this case.

rate. The new dumping requirement for a commercial hauler to qualify for the municipal rate was 100 tons per day. Finally, in August 1997 a fourth resolution was passed by the ESWDA concerning the minimum required dumping amount enabling a commercial hauler to qualify for the municipal rate. The fourth resolution provided that a commercial hauler was entitled to receive the municipal rate if 500 tons of C&D waste were dumped.[3]

Seven days following the passage of the first two resolutions, Faulk, Probate Judge of Crenshaw County, Alabama and Williamson, County Administrator for Crenshaw County, Alabama formed a company called Big Wheel Recycling, Inc. ("BWRI").[4] BWRI was formed by Faulk and Williamson in an attempt to take advantage of the discounted dumping rate available to commercial recycling companies located in Etowah County.[5] To this end, Faulk entered into contracts with four mobile home manufacturers located in Marshall County, Alabama to haul their C&D

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[3]The resolution did not specify the time period over which the minimum dumping requirement must be met in order to qualify for the municipal rate. However, witnesses testified and the Government all but conceded at trial that the 500 ton requirement was monthly.

[4]Williamson owned 998 of the outstanding 1000 shares of BWRI's stock and served as President of the corporation. Faulk was the Chief Executive Officer of BWRI and controlled the day-to-day activities of the corporation.

[5]The Government alleges that BWRI was formed as part of the conspiracy that existed between the Appellants wherein they sought to impermissibly receive discounted dumping rates at the Etowah County landfill through the assistance of Brian McKee.

waste. Because of the discounted dumping rate at the Etowah County landfill, Faulk could offer the mobile home manufacturers significantly reduced hauling rates for their C&D waste and still earn a substantial profit for BWRI. In order to qualify for the discounted dumping rate, however, BWRI would have to meet certain criteria. Yet, as the Government alleges, BWRI knowing and fraudulently received an $8.75[6] per ton dumping rate despite not meeting the criteria as established through the various ESWDA resolutions.

II. DISCUSSION

A. Sufficiency of the Evidence

The Government contends that the Appellants engaged in an elaborate scheme to defraud the ESWDA through a pattern of mail fraud and money laundering in order to impermissibly take advantage of the $8.75 per ton discounted dumping rate available at the Etowah County landfill. Simply explained, the Government contends that Brian McKee directed employees of the ESWDA to give BWRI an $8.75 per ton dumping rate knowing that BWRI was not a recycling company located in Etowah County nor had met the minimum dumping requirements. As payoff for knowingly and impermissibly being given the $8.75 per ton dumping rate, according to the Government, BWRI would funnel profits earned from the four mobile home manufacturers back to Brian McKee through his wife Jennifer, an employee of BWRI who ran an office for BWRI out of her Etowah County home. In total, the Government contends that BWRI defrauded the ESWDA of approximately $1.4 million.

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[6]The $8.75 per ton rate is the result of a fifty percent discount from the municipal rate of $17.50.

Appellants contend that there is insufficient evidence to sustain their convictions for mail fraud and conspiracy to commit mail fraud. Appellants' contention that there is insufficient evidence to sustain their convictions is an issue we decide *de novo*. *United States v. Miles*, 290 F.3d 1341, 1355 (11th Cir.2002). We review the evidence to determine whether "a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the Government could find the defendants guilty as charged beyond a reasonable doubt." *United States v. Navarro-Ordas*, 770 F.2d 959, 966 (11th Cir.1985) (internal citations omitted). A jury's verdict will be affirmed if the court determines that a "jury was rationally able to find that every element of the charged crimes was established by the Government beyond a reasonable doubt." *See United States v. McCarrick*, 294 F.3d 1286, 1289-90 (11th Cir.2002).

1. Mail Fraud

The Government presented evidence that could lead a reasonable jury to conclude that the Appellants knowingly and willfully defrauded the ESWDA by receiving a discounted dumping rate of $8.75 per ton to which BWRI was not entitled. Whether BWRI was entitled to an $8.75 per ton dumping rate, at the most basic level and as was hotly litigated at trial, concerns whether BWRI was a recycling company located in Etowah County.[7]

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[7]Appellants concede that BWRI never met the minimum dumping requirements needed to qualify for the municipal rate. The evidence further demonstrates that BWRI's account with the ESWDA was not paid and up-to-date. Appellants argue, however, that the first resolution is independent of the other resolutions and, although silent on this point, is intended to give a fifty percent discount from the municipal rate to those recycling companies

The Appellants argue that BWRI was a recycling company because it engaged in what they term "source separation" which, as described by the Appellants, entails providing the means for separation and segregation of putrescible waste from non-putrescible waste. Appellants presented evidence at trial from both experts and lay witnesses which they argue proves that BWRI was engaged in source separation and that source separation is part of the recycling process. On this point, the evidence at trial shows that BWRI provided large trash containers known as pans to the various mobile home manufacturers so that the putrescible waste of the manufacturers could be disposed of separately from the non-putrescible waste. Thereafter, BWRI would pick up the pans of non-putrescible waste and haul them to the Etowah County landfill for dumping. The putrescible household garbage would also be picked up by BWRI, however, such waste was directed to a proper dump site.

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located in Etowah County. In opposition, the Government argues that the first resolution simply grants a fifty percent reduction from whichever rate would ordinarily apply and that in order to qualify for the $8.75 per ton rate, BWRI would have to be a recycling company located in Etowah County that had an up-to-date account with the ESWDA and met the minimum per month dumping requirement. While we need not resolve this issue, suffice it to say, a reasonable jury, based on all the evidence, could conclude that absent meeting the minimum dumping requirements and having an up-to-date account with the ESWDA, at best, a commercial recycling company located in Etowah County would qualify for a fifty percent discount from the commercial rate rather than from the municipal rate. Furthermore, BWRI's repeated failure to meet such criteria despite receiving the $8.75 per ton dumping rate is circumstantial evidence of the Appellants' intent to defraud the ESWDA and provides further support for the jury's verdict.

Thus, as Appellants argue, source separation is certainly the beginning of the recycling process.

The Government presented evidence at trial showing that outside of the limited cardboard recycling that occurred in 1995, BWRI did not act as a recycling company. The Government argued at trial and now argues on appeal that BWRI is, in reality, nothing more than a regular commercial hauler of waste. Evidence in support of this position shows that the non-putrescible waste removed from the mobile home manufacturer facilities was simply transported to and dumped at the Etowah County landfill where it was covered in dirt.[8] Thus, as the Government contends and as the evidence demonstrates, the non-putrescible waste hauled by BWRI was not part of the recycling process because it was not destined for a recycling facility nor was it being recycled by BWRI. We conclude, therefore, that although "source separation" may begin the recycling process in some instances, a reasonable jury could conclude that BWRI was not recycling because it simply transported the non-putrescible waste from the mobile home manufacturers to the Etowah County landfill to be dumped without hope of ever being recycled for further use.[9]

In further support of their position, Appellants argue

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[8]Walter Nichols, a defense recycling expert, even testified that simply hauling non-putrescible waste to be dumped with no further expectation of that waste being converted and put to use is not recycling. This conclusion was supported by the Government's recycling experts.

[9]The Government showed that on many occasions putrescible waste from the mobile home manufacturers was not separated from the non- putrescible waste. Thus, on those occasions, BWRI was illegally dumping putrescible waste at the Etowah County landfill.

that the evidence presented at trial shows that upon dumping of the non-putrescible waste at the Etowah County landfill, BWRI employees would sift through the rubble and would remove useable items such as carpet, wood, salvageable appliances, and copper wire for both personal use and resale. We simply conclude that a reasonable jury could have concluded that such activity does not qualify BWRI as a recycling company. The evidence shows that such activity, if it occurred, was sporadic at best. Further, the credibility of the main BWRI employee engaged in this practice, Bill Faulk, was significantly undermined as the Government elicited from the witness that he would personally haul, dump, and look through four to five loads of waste per day weighing anywhere from four to six tons and, thereafter, would remove any salvageable items from the rubble and transport those items to his house for storage.[10]

Finally, the Government presented the testimony of Larry Nobel, a driver for BWRI, who indicated that BWRI was not engaged in any recycling. This testimony is consistent with statements Faulk himself made to law enforcement officials and introduced into evidence wherein he indicated that BWRI was not engaged in recycling activities.[11] Furthermore, statements from Brian McKee to law enforcement officials were introduced into evidence wherein

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[10]To describe this testimony as incredulous would be an understatement. As one witness during the trial described, this practice, if it occurred, amounted to nothing more than "pilfering." We conclude that a reasonable jury could have determined that this practice does not constitute recycling.

[11]Out of concern for a possible *Bruton* violation, the district court instructed the jury on two separate occasions that Faulk's statements were to be considered solely against him.

he indicated that he knew what he was doing was illegal.[12] Thus, we conclude that a reasonable jury could conclude that BWRI was not a recycling company.[13] Therefore, we affirm Appellants' mail fraud convictions.[14]

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[12]Appellants Faulk, Williamson, and Jennifer McKee appeal the introduction of Brian McKee's statements to law enforcement as being admitted into evidence in violation of *Bruton*. The district court instructed the jury on two separate occasions that Brian McKee's statements were to be considered solely against him. As discussed below, we affirm the district court's admission of Brian McKee's statements into evidence.

[13]Because we conclude that a reasonable jury could conclude that BWRI was not a legitimate recycling company, we need not address in detail the evidence concerning whether BWRI was located within Etowah County. In summary, however, we conclude that a reasonable jury could conclude, as the Government argues, that BWRI's attempt to run an office out of Jennifer McKee's Etowah County house was a sham, was part of the conspiracy to defraud the ESWDA, and is further evidence of the Appellants' knowing and willful attempt to receive an $8.75 per ton dumping rate for which BWRI did not legitimately qualify.

[14]Unlike her codefendants, Jennifer McKee testified in her own defense. Thus, per our circuit precedent, the jury was free to disbelieve her and use her testimony as substantive evidence proving her guilt. *See United States v. Cotton*, 770 F.2d 940, 945 (11th Cir.1985) ("When a defendant takes the stand in a criminal case . . . the jury is free to disbelieve him and reject his explanation as a complete fabrication."); *United States v. Goggin*, 853 F.2d 843 (11th Cir.1988) (same); *see also, United States v. Allison*, 908 F.2d 1531 (11th Cir.1990) ("The jury may view the defendant's false explanatory statement as substantive evidence proving guilt.").

2. Money Laundering

Appellants Faulk, Williamson, and Brian McKee contend that the evidence is insufficient to sustain their convictions for money laundering and conspiracy to commit money laundering. To obtain a conviction on a substantive Section 1956(a)(1)(A)(I) promotional money laundering charge, the Government bears the burden of proving beyond a reasonable doubt that: (1) the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew the property involved in the transaction represented the proceeds of unlawful activity; (3) the property involved was in fact the proceeds of the specified unlawful activity; and (4) the defendant conducted the financial transaction "with the intent to promote the carrying on of [the] specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(I). We find that all of these required elements have been satisfied.[15]

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[15]In their briefs, Appellants argue that the evidence is insufficient to constitute concealment and that the books and records of BWRI including all bank accounts were open, clean, and clear. However, concealment or an intent to conceal the nature or sources of the proceeds has no bearing in this case as it is not a required element of the offense for which Appellants were charged. Section 1956(a)(1) defines two separate money laundering offenses: those committed with the "intent to promote the carrying on of a specified unlawful activity," 18 U.S.C. § 1956(a)(1)(A)(I); and those committed with the intent "to conceal or disguise the nature, location, the source, the ownership, or the control of the proceeds of the specified unlawful activity," 18 U.S.C. § 1956(a)(1)(B)(I). While Count 19 alleges both money laundering offenses, at some point the Government appeared to abandon the concealment charge and focus exclusively on the promotional charge. Thus, in effect, Count 19 is in line with Counts 20-31 which allege only promotional money laundering.

The evidence amply demonstrates, as the Government contends, that bank deposits of proceeds of the fraudulent activity were made by Appellants and that such deposits were designed to convert the checks received from the mobile home manufacturers into cash in order to capitalize on the fraud perpetrated upon the ESWDA. Thus, the depositing and cashing of checks that represented the proceeds of the mail fraud promoted not only the Appellants' prior unlawful activity, but also their ongoing and future unlawful activity. Such evidence is sufficient to sustain a conviction for promotional money laundering. *See, e.g., United States v. Haun*, 90 F.3d 1096, 1100-01 (6th Cir.1996). Further, since the ultimate object of the conspiracy was to transfer the unearned dumping rate into cash, the financial transactions were in furtherance of the ongoing conspiracy offense and are sufficient to sustain Appellants' convictions. *See United States v. Carcione*, 272 F.3d 1297 (11th Cir.2001).

B. *Bruton*

Despite the efforts of defense counsel, Government counsel, and the district court, Faulk, Williamson, and Jennifer McKee contend that the admission of statements of Brian McKee, even in their redacted form, violate *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). At trial, the Government introduced through the testimony of Special Agent Keith Baker admissions of nontestifying codefendant Brian McKee wherein he indicated that "he was being paid because of his having gotten the recycling resolution passed and for giving Big Wheel the discounted rate of $8.75 a ton for dumping debris at the Etowah Solid Waste Disposal Authority." Faulk and Williamson argue that Brian McKee's statement facially implicates BWRI thus necessarily implicating them in violation of *Bruton*. Additionally, Special Agent Baker testified that Brian McKee stated that "money that came through Jennifer was his." Jennifer McKee argues that this facially implicates her in

violation of *Bruton*. For the following reasons we disagree and affirm the district court.

The Supreme Court held in *Bruton* that post-arrest statements made by nontestifying codefendants that facially incriminate other defendants are inadmissible into evidence because such statements violate the other defendants' Sixth Amendment rights to confront and cross-examine adverse witnesses. The Supreme Court concluded that "where the powerfully incriminating extra-judicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial," limiting instructions by the court will not suffice to eliminate the prejudicial effect of the introduction of such statements. *Bruton*, 391 U.S. at 135-36, 88 S.Ct. 1620. In *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), however, the Supreme Court had occasion to consider whether the confession of a nontestifying codefendant admitted during a joint trial that had been redacted to omit the names of all codefendants violated the rule established in *Bruton*. In that instance, the Court refused to apply *Bruton* and concluded that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with the proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S. at 211, 107 S.Ct. 1702. The Court concluded that in such a situation, the confession is not so "powerfully incriminating" that a limiting instruction given by the district court could not effectively eliminate any prejudicial effect to the codefendants. *Id.* at 208, 107 S.Ct. 1702. The *Richardson* Court, however, "expressed no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n. 5, 107 S.Ct. 1702. That was an issue subsequently addressed by the Supreme Court in *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998).

In *Gray*, a confession written by a codefendant that explicitly referred to the defendant was redacted to eliminate any reference to the defendant. However, the defendant's name was replaced with the word "deleted" or was simply left as a blank space. *Gray*, 523 U.S. at 188, 118 S.Ct. 1151. When the Government's law enforcement witness read the codefendant's confession into evidence, he said "deleted" wherever the defendant's name had been redacted. The witness then testified that following the receipt of the codefendant's confession, he arrested the defendant. The Supreme Court concluded that the "obviously redacted confession" violated *Bruton* because it "pointed directly to the defendant." *Id.* at 194, 118 S.Ct. 1151. Thus, the Court concluded that the redacted confession "facially incriminated" the defendant and "involved inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* In reaching this conclusion, the Court distinguished its decision in *Richardson* where the redacted confession "became incriminating 'only when linked with evidence introduced later at trial.' " *Id.* at 196, 118 S.Ct. 1151 (quoting *Richardson*, 481 U.S. at 208, 107 S.Ct. 1702).

We find that the *Bruton* question raised in this case is covered by *Richardson*. In *Richardson*, the Supreme Court clearly authorized the admission of a nontestifying codefendant's confession where such confession omitted reference to the defendant and was coupled with a limiting instruction. We fail to see how the statement of Brian McKee implicates, directly or otherwise, Faulk or Williamson. Faulk's and Williamson's arguments to the contrary are unavailing. Brian McKee's statement reflects only that he was paid to pass the recycling resolution and give BWRI a discounted dumping rate. The statement, as quoted above, does not facially implicate Faulk or Williamson as was the case with the confession the Supreme Court addressed in *Bruton*, nor was the statement "obviously redacted" as was the case in *Gray*. The statement itself is silent as to who paid Brian McKee.

Furthermore, even assuming that it is self-evident that BWRI was paying Brian McKee for passing the resolution and giving the discounted rate, naming BWRI does not facially implicate either Faulk or Williamson. In order to make that inferential link, additional, independent evidence is needed. Simply because the Government provided the jurors with the independent evidence needed to make that link does not create a *Bruton* violation.[16] What the Government accomplished in this case is what the Supreme Court specifically authorized in *Richardson*.

Brian McKee's statement concerning Jennifer McKee, however, does directly implicate her. However, Special Agent Baker's testimony on this point was a product of defense cross-examination wherein counsel for Faulk and Williamson asked Special Agent Baker:

> Q. Rather than claiming that Big Wheel paid him money, wasn't he really just saying that any money that Jennifer, his wife, got from Big Wheel, he claimed was his money? Isn't that basically the gist of what he was saying?
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> A. He said money that came through Jennifer was his.

Because defense counsel received the very answer seemingly solicited, we are hard-pressed to conclude that a *Bruton* violation exists. Furthermore, counsel for Jennifer

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[16]By our conclusion, we do not mean to suggest that Brian McKee's statement did not potentially inculpate Faulk or Williamson. Rather, consistent with the Supreme Court's decision in *Richardson*, we simply conclude that the jury could follow the court's limiting instructions and limit the use of such statements to the proper defendant.

McKee did not object to the question or to the answer.[17] Because a timely objection was not interposed, we review the district court's admission of this evidence for plain error. *United States v. Foree*, 43 F.3d 1572 (11th Cir.1995).

As we held in *Foree*, to satisfy the plain error standard, "a party must demonstrate: (I) that there was an error in the lower court's action, (ii) that such error was plain, clear, or obvious, and (iii) that the error affected substantial rights, i.e. that it was prejudicial and not 'harmless.'" *Foree*, 43 F.3d at 1578 (citing *United States v. Olano*, 507 U.S. 725, 732-37, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993)). The defendant bears the burden of proving prejudice. *Id.* Finally, "even if all three of these prerequisites are fulfilled, the Courts of Appeals should correct such errors only when they 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)).

We conclude that none of the *Foree* plain error prongs have been satisfied. Simply put, the statement concerning Jennifer McKee was the product of defense cross-examination, the answer provided be Special Agent Baker was specifically tailored to the question asked, and the district court did not err in failing to intervene as counsel failed to object or in any way bring the alleged error to the attention of the district court. Thus, it is readily observable that any error, even if we were to presume its existence, was not plain, clear, or obvious. Finally, we conclude that Jennifer McKee failed to prove that the error was not harmless. First, the two limiting instructions

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[17]We recognize that Jennifer McKee joined in Faulk's and Williamson's objections to the Government's introduction of Brian McKee's statement. However, the material covered in this question and answer had not been presented by the Government.

given by the district court dissipated any prejudice to Jennifer McKee. Secondly, Jennifer McKee's testimony, with nothing more, clearly supports the jury's conclusion as to her guilt. Therefore, when the prejudicial effect of the admission of the statement is compared to the properly admitted evidence of Jennifer McKee's guilt, it appears clear that there is no reasonable probability that the improper statement contributed to the conviction. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 1060, 31 L.Ed.2d 340 (1972).

III. CONCLUSION

After a thorough review of the record and consideration of the parties' briefs and oral argument, we conclude that there is sufficient evidence to sustain the convictions of Faulk, Williamson, and Brian and Jennifer McKee. Furthermore, we conclude that the district court did not err in admitting Brian McKee's statements. Rather, we commend the district court for taking the time to conduct an extensive *Bruton* hearing and for tailoring the admission of Brian McKee's statements so as to ensure a fair trial for all Defendants.[18]

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[18]The dissent would find a violation of due process as to Brian McKee. We respectfully disagree. This very experienced district judge stated in his order of January 4, 2002, that he had considered the recommendation of the United States Magistrate Judge and the objections filed by the defendant Brian McKee. He also stated that he made an independent review of the file and then made his rulings. We believe that he did exactly what he says he did. In our opinion, this is in accord with *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). We do not believe that there is any meaningful difference between the words "*de novo* determination" and "an independent review of the file." The ultimate decision was made by the district judge after

AFFIRMED.

DOWD, District Judge, concurring in part and dissenting in part:

Initially, I concur in the affirmance of the convictions and sentences of the appellants Dwight Faulk, Linda Williamson and Jennifer McKee. I respectfully dissent as to the affirmance with respect to appellant Brian McKee.

The centerpiece of the Government's case against Brian McKee was the recitation of his oral admission as offered by FBI Special Agent Keith Baker. Simply put, Agent Baker stated that Brian McKee told him "that he knew what he was doing was illegal" in the following testimony:

> Q. Sir, did you have an opportunity to conduct an interview of Brian McKee?
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> A. Yes, I did.
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> Q. Did Mr. McKee tell you that his address is 400 Bachelor Chapel Road, Gadsden, Alabama?
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> A. He did.
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> Q. Did he tell you that Big Wheel Recycling was formed in 1995 and it is a corporation?
>
> A. What year did you say, sir?
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> Q. Formed in 1995.

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reviewing the entire file. This meets the due process requirements according to *Raddatz*.

A. That's correct.

Q. Did McKee tell you that he brought forward the resolution to allow recyclers to get a discounted rate at the Etowah Solid Waste Disposal Authority?

A. Yes, he did.

Q. Did McKee claim that he was being paid because of his having gotten the recycling resolution passed and for giving Big Wheel the discounted rate of $8.75 a ton for dumping debris at the Etowah Solid Waste Disposal Authority?

A. Yes, he did.

Q. When he was asked if the board members knew of the $8.75 a ton rate, did he tell you that he was never questioned about it by any of them?

A. He did.

Q. Did he tell you that he left the $17.50 per ton rate on the weight scale bills so the manufactured housing companies would not know about the $8.75 a ton rate?

A. He did.

Q. Did he tell you that CEI also got the $8.75 a ton rate, and they were not entitled to it?

A. That is correct.

> Q. Did he tell you that Sue Rogers did not know about the Big Wheel Recycling--did not know about Big Wheel Recycling when the 50 percent discount resolution was passed?
>
> A. That is correct.
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> Q. Did Mr. McKee tell you that he knew what he was doing was illegal? A. Yes, he did.[1]

Tr., Vol. 20 of 29 at 154-55.

In advance of trial, on August 3, 2001, Brian McKee filed a motion to suppress his statements "of any nature obtained . . . by any and all investigative officers." In addition to raising a *Miranda* claim,[2] Brian McKee alleged that the statements "were involuntary" for several reasons: (1) because statements made by the investigating officers to the defendant were intentionally false and misleading; (2) because the defendant was exhausted due to the late hour and the fact that the interrogation was so long in duration, causing him to

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[1]The other appellants, Faulk, Williamson, and Jennifer McKee, all opposed the admission of Baker's testimony that Brian McKee had told Baker that McKee knew what he was doing was illegal as a violation of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). I concur with my brethren that the admission of Brian McKee's testimony did not violate *Bruton*. My review of the record indicates that the Government only used the admission of "illegality" against Brian McKee. Moreover, the district court properly limited the jury's consideration of the admission to the Government's case against Brian McKee.

[2]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

suffer from shock and emotional trauma based on his concern for his wife; (3) because of the attitude of the investigating officers toward the defendant; (4) because of promises made by the investigating officers to the defendant; and (5) because the defendant was coerced by the investigating officers into making these statements.

A second motion was also filed on August 3, 2001 and stated in part as follows:

> 5. The statements were involuntary because of statements made to the defendant by the investigating officers were intentionally false and misleading regarding their intentions concerning the interview.
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> 6. That all statements and interviews were made because of promises made by the investigating officers to the defendant regarding their intentions to bring charges against this defendant and the wife of this defendant. *That the statements were involuntary in that the Government did not live up to their promises and therefore coerced the defendant into making these statements in hopes of gaining the reward which he was promised.* R.E. at 6 (emphasis added).

The Government filed a response on August 24, 2001 and replied to McKee's contention that the teachings of *Miranda* had been violated by demonstrating that McKee was never in custody during any of the three questioning sessions conducted on February 17, 2000, February 25, 2000, and March 14, 2001. Additionally, the Government pointed out that Brian McKee was accompanied by counsel for the interviews of

February 25, 2000 and March 14, 2001. However, the Government's response ignored the allegations of a coerced statement.

The evidentiary hearing in response to Brian McKee's motion to suppress his statements was conducted on November 19, 2001 before a magistrate judge. McKee testified that he had been promised that if he cooperated with the investigation, his wife would not be prosecuted. The Government did not present any testimony to rebut the McKee claim of an involuntary admission.

Magistrate Judge Walker's Report and Recommendation filed on December 14, 2001 addressed the issue of voluntariness as raised by Brian McKee and recommended a denial of his motion to suppress.

On December 27, 2001, Brian McKee's counsel filed very thorough objections[3] to the Report and Recommendation of Magistrate Judge Walker.

On January 4, 2002, the district court, after stating that "he engaged in an independent review of the file," denied the objections of Brian McKee entered on December 27, 2001.

The watershed case of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), settled the dispute as to

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[3]The Report and Recommendation was filed on Friday, December 14, 2001. McKee's counsel is located in Gadsden, Alabama. He filed the objections on December 27. No claim was advanced that the objections were filed untimely. The record is inconclusive as to whether Brian McKee's counsel received the Report and Recommendation on December 14. Consequently, for the purpose of this dissent, I conclude that the objections of December 27 were timely filed.

whether a judge should submit the issue of voluntariness of a confession to the jury with instructions to ignore the confession if the jury found the confession to be involuntary. The Court held that the issue of voluntariness was to be decided in a pre-trial setting by the judge. If the confession was deemed involuntary, it was not to be submitted to the jury.

In this case, Brian McKee offered testimony on the issue of voluntariness. His testimony was not rebutted. In her recommendation, Magistrate Judge Walker opined that McKee's testimony was not credible and thus excused the lack of rebuttal by the Government.

The ruling in *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), with respect to the use of magistrate judges to conduct suppression hearings in criminal cases in United States District Court proceedings, merits discussion. By a 5-4 vote, the Supreme Court determined that the district court did not have to hear anew the conflicting testimony heard by the assigned magistrate judge who conducted the suppression hearing.[4] The defendant testified that he had made incriminating statements at a meeting with Government agents only after "obtaining confirmation" from the agents of their earlier promise that the indictment against him would be dismissed if he cooperated. The agents testified at the suppression hearing and denied making the promise. Confronted with an issue of credibility, the magistrate judge filed a report which recommended that the defendant's motion be denied after stating: "I find the testimony of the Alcohol, Tobacco and Firearm Agents more credible . . . ; I find that Federal agents never advised [respondent] that charges against him would be dismissed, if he cooperated." The

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[4]In so ruling, the Supreme Court reversed the contrary decision in *United States v. Raddatz*, 592 F.2d 976 (7th Cir.1979).

Seventh Circuit had ruled that Raddatz had been deprived of due process by the procedure used and by the failure of the district court to rehear the testimony before accepting the recommendation of the magistrate judge. Nonetheless, the Supreme Court ruled that the due process rights of the defendant were protected by the Federal Magistrates Act because the district court acts as the ultimate decision maker on the defendant's suppression motion with broad discretion to accept, reject or modify the magistrate judge's proposed findings which include the discretion to hear the witnesses to resolve conflicting credibility claims. The majority held that the *de novo* determination of contested credibility assessments without personally rehearing the live testimony did not violate due process.

In the *Raddatz* decision, the majority opinion written by Chief Justice Burger described the actions of the district court after it received the magistrate's report as follows:

> Respondent filed objections to the Magistrate's report. In rendering its decision, the District Court stated that it considered the transcript of the hearing before the Magistrate on the motion to suppress, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, and that it read the recommendation of the Magistrate and heard oral argument of counsel. Finding "that the three statements given by the defendant and sought to be suppressed were made voluntarily," the District Court accepted the recommendation of the Magistrate and denied the motion to suppress.

447 U.S. at 672, 100 S.Ct. 2406.

In the case at hand, the district court stated, in

response to the objections to the magistrate's report as it applied to the defendant Brian McKee's objections to the denial of the motion to suppress, simply that he made "an independent review of the file" and, based on that review, denied the motion. Contrary to *Raddatz*, there is no suggestion that the district court had considered the transcript of the testimony; there is no suggestion of a "*de novo* determination" of those portions of the magistrate's report, findings or recommendations to which the objections had been made, as required by 28 U.S.C. § 636(b)(1)(C). Furthermore, the absence of any suggestion of a *de novo* determination comes in a situation where, as pointed out by the magistrate and contrary to the conflicting testimony of the setting in *Raddatz*, the Government did not even bother to offer rebutting testimony to the testimony of Brian McKee.

Under the circumstances as above outlined, and accepting the teachings of *Raddatz*, it is my view that the due process rights of Brian McKee were violated in this case.[5] To

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[5]I find support in *Martinez v. Estelle*, 612 F.2d 173, 180 (5th Cir.1980), in which the Fifth Circuit found, after citing *Jackson v. Denno*, that "the record before us does not establish with 'unmistakable clarity' that the trial judge reliably determined the voluntariness of the confession. *Jackson v. Denno* has not been satisfied." *See also Jeffrey S. v. State Board of Education of State of Georgia*, 896 F.2d 507, 513 (11th Cir.1990) (criticizing failure to conduct the requisite *de novo* review where the district court "relied heavily upon the magistrate's assessment of the evidence and his judgment in drawing reasonable inferences therefrom."); *Stokes v. Singletary*, 952 F.2d 1567, 1576 (11th Cir.1992) (criticizing district court's failure "to accord a *de novo* review of the magistrate's factual findings"). The majority here seems to be setting up a new standard of review based on the length of experience of the district judge.

hold otherwise would be the equivalent of improperly delegating Article III powers.[6]

Consequently, I would reverse the conviction of Brian McKee, vacate his sentence, and remand for a new trial.

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[6]Although 28 U.S.C. § 636(b)(1)(B) permits a district judge to refer a motion to suppress to a magistrate judge for recommendations regarding disposition, § 636(b)(1)(C) "meticulously sets forth a *de novo* review procedure." *Gomez v. United States*, 490 U.S. 858, 874, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989) (holding that allowing a magistrate judge to conduct the *voir dire* for jury selection in a felony case was not harmless error, especially because it was "without any meaningful review by a district judge"). I doubt that the *Gomez* Court would find "meaningful" the cursory and unexplained "review of the file" conducted by the district court in the instant case.

FILED
U.S. COURT OF APPEALS
OCT 03 2003
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 02-12765-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LINDA WILLIAMSON,
a.k.a. Linda West,
DWIGHT FAULK,
JENNIFER MCKEE,
BRIAN MCKEE,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: DUBINA and FAY, Circuit Judges and DOWD,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

*Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
OCT 21 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12765-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LINDA WILLIAMSON,
a.k.a. Linda West,
DWIGHT FAULK,
JENNIFER MCKEE,
BRIAN MCKEE,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

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ORDER:

( ) The motion of Appellant, Dwight Faulk and Linda Williamson, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant, Dwight Faulk and Linda

Williamson, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *January 2, 2004*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/
UNITED STATES CIRCUIT JUDGE

FILED
DEC. 3 2001
CLERK
U.S. DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 01-106-N**
	)	
LINDA WILLIAMSON	)	
a/k/a LINDA WEST	)	

ORDER

It is ORDERED that the Government show cause, if any there be, in writing, by December 10, 2001, as to why defendant Linda Williamson's motion to excluded *Bruton* evidence, or in the alternative, motion *in limine*, filed August 2, 2001 (Doc. no 74), should not be granted.

DONE, this 3rd day of December, 2001.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

FILED
DEC. 6 2001
CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 01-106-N**
	)	
DWIGHT FAULK, et al.	)	

ORDER

Before the court are motions to sever by defendants Williamson, Faulk, Jennifer McKee and Brian McKee. *See* Doc. ##81, 82, 85 and 106; *see also* Doc. ##121, 125 (motions to supplement motions to sever). For the reasons set out *infra*, the court concludes that the motions to sever are due to be denied.

Discussion

Williamson and Faulk contend that their trial should be severed from Brian McKee's trial because (1) McKee's defense will be antagonistic to their defenses, and (2) McKee will need to be called and cross-examined in their case. Williamson and Faulk also maintain that their trial should be severed from that of Jennifer McKee because the latter must also be called as a witness. In their motions to supplement, Williamson and Faulk contend that the use of 404(b) evidence against Brian McKee in a joint trial will prejudice them.

Jennifer McKee argues that her trial should be severed from that of the other defendants under Fed.R.Crim.P. 8(b) and 14 on the ground: (1) that the indictment does not properly allege that McKee participated in the same acts or transactions with other defendants; and (2) that the other defendants, who may choose not to take the stand in a joint trial, have made incriminating statements which may be offered against McKee without an opportunity for her to cross-examine.

Brian McKee asks that his trial be severed from that of the other defendants because "the discovery and documentation associated with each individual Defendant differs and in addition thereto there are various interviews and statements . . . that do not apply to each and every defendant," and because "each and every Exhibit, Interview, and Statement . . . would be objected to by at least one of the other Defendants on all occasions," which "would interfere with the trial process in that it would not allow the Jury to carefully consider the admissible evidence as to each Defendant in this cause."

I. Joint trial under Rule 14

Though the defendants, other than Jennifer McKee, do not specify the rules under which they move for severance, the court assumes that they seek severance pursuant to Federal Rule of Criminal Procedure 14.[1] The court concludes that Rule

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[1]Jennifer McKee – and possibly other defendants – also seek severance under Rule 8. "In contrast to a Rule 14 claim, which accepts that initial joinder is proper but asserts that a joint trial is prejudicial, a Rule 8(b) claim 'questions the propriety of joining two or more defendants in a single indictment in the first instance.'" *United States v. Wilson*, 894 F.2d 1245, 1252-53 (11th Cir. 1990)(citation omitted). The court

14 severance is not warranted in this case.

"There is a preference in the federal system for joint trials of defendants who are indicted together." *United States v. Talley*, 109 F.3d 277, 279 (11th Cir. 1997). "The burden is on the defendant to 'demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of his defense.'" *United States v. Schlei*, 1122 F.3d 944, 984 (11th Cir. 1997). "[U]ndocumented, conclusory allegations are insufficient to meet the defendant's burden and "to overcome [the] strong circuit preference favoring joint trials." *United States v. Smith*, 918 F.2d 1551, 1561 (11th Cir. 1990); *see also United States v. Wingate*, 997 F.2d 1429, 1431 (11th Cir. 1993) (conclusory allegations insufficient). Defendants' general and conclusory allegations that joint trial would be prejudicial or unfair to defendants do not meet defendants' burden. Further, because in most joint trials the evidence will implicate some participants to a greater extent than others, defendants fail to show compelling prejudice by showing some spillover of evidence. *United States v. Beale*, 921 F.2d 1412, 1428 (11th Cir. 1991). In this case the court has no reason to believe that the jury cannot independently evaluate the evidence against each defendant, follow the court's limiting instructions when

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examines only the allegations on the face of the indictment to determine whether joinder was proper under Rule 8(b). *Id.* at 1253. "'Rule 8 is broadly construed in favor to the initial joinder.'" *United States v. Dominguez*, 226 F.3d 1235, 1238 (11th Cir. 2000). Joinder is proper even if each participant is not involved in every phase of the venture, and each participant does not know of the other participants' roles and identities. *Wilson*, 894 F.2d at 1253. Upon careful review of the indictment in this case, the court is satisfied that the acts alleged are sufficiently united by a substantial identity of facts and/or participants so as to make initial joinder proper under Rule 8(b).

appropriate, and arrive at an individualized determination as to each defendant. Defendants have not established otherwise.

II. Exculpatory testimony of co-defendants

In addition to their general contentions that severance is appropriate, Williamson and Faulk appear to ask the court to separate their trials from those of the other defendants on the ground that co-defendants Brian and Jennifer McKee will take the stand and give testimony on their behalf only if severance is granted.

In this circuit, to obtain a severance based upon the exculpatory testimony of a co-defendant, defendants must show: "(1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the co-defendant would indeed have testified at a separate trial." *United States v. Funt*, 894 F. 2d 1288, 1297 (11th Cir. 1990); *see also United States v. Adams*, 1 F.3 1566, 1579 (11th Cir. 1993). Even if defendants make this facial showing, "'the district court must then (1) examine the significance of the testimony in relation to the defendant's theory of the defense, (2) assess the extent of prejudice caused by the absence of the testimony, (3) pay close attention to judicial administration and economy, and (4) give weight to the timeliness of the motion.'" *United States v. Harris*, 908 F.2d 728, 739 (11th Cir. 1990) (citation omitted).

The motions of Williamson and Faulk do not make the necessary facial showing, as they fail to discuss the bona fide need for the testimony, explain the substance of the desired testimony, specifically address the exculpatory nature and effect of the desired testimony, and establish that the co-defendant would indeed have testified at a separate trial. No affidavits from co-defendants have been filed in support of the

motions. *See United States v. Wingate*, 997 F.2d 1429, 1432 n. 6 (11th Cir. 1993) (Defendant's failure to support motion to sever with affidavits tending to suggest that a co-defendant possessed and was willing to share any exculpatory evidence was fatal to the motion); *see also United States v. Beale*, 921 F.2d 1412, 1428-29 (Requiring affidavit from co-defendant stating the exact substance of his proffered testimony and the fact that he had actually agreed to testify). The court has no basis on which it may conclude that any co-defendant is willing to offer exculpatory testimony at Williamson's or Faulk's trials if severance is granted and, thus, the motion is due to be denied.

III. *Bruton* Evidence

Jennifer McKee also asks the court to sever her trial on the ground that her co-defendants have given statements to law enforcement, and their trials must be severed from hers to prevent the introduction of any incriminating statement by a non-testifying co-defendant in a joint trial in violation of defendants' Sixth Amendment rights to confrontation and cross-examination of witnesses under *Bruton v. United States*, 391 U.S. 123 (1968).

In *Bruton*, the Supreme Court held that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incrimination confession of a non-testifying co-defendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant." *Richardson v. Marsh*, 481 U.S.200, 208 (1987). *Richardson*, a subsequent Supreme Court case, held that when a statement is not incriminating on its face, but becomes so only when linked with evidence introduced later at trial, the statement need not be excluded provided it is redacted to eliminate not only the defendant's name, but also any reference to his or her existence, and the jury is given a proper limiting instruction. *Id.* at 211; *see also Gray v. Maryland*, 523 U.S. 185 (1998) (redacted confession that refers directly to the

existence of the non-confessing co-defendant comes within the *Bruton* rule).

The *Bruton* argument offered by McKee in her motion to sever is brief and general in nature, and she has not specifically pointed out which statements of co-defendants she contends are facially incriminating. In its response to defendants' motions to sever (Doc. # 136), the Government maintains that it "is familiar with the Supreme Court's holding in *Bruton* and has no intention of offering evidence that would violate the rule set forth in *Bruton*." Under these circumstances, the court cannot at this stage conclude that *Bruton* compels severance in this case.

IV. Antagonistic Defenses

Williamson and Faulk contend that their trial should be severed from Brian McKee's trial because McKee's defense will be antagonistic to their defenses.

Mutually antagonistic defenses are not prejudicial per se. *Zafiro v. United States*, 506 U.S. 534, 538 (1993). The fact that defendant may have a better chance at acquittal if tried separately does not alone entitle him or her to severance. *Id.* at 540. In *Zafiro*, the Court held that, when defendants have been joined properly under Rule 8(b), the district court should grant Rule 14 severance only if (1) there exists "a serious risk that a joint trial would compromise a specific trial right of one of the defendants," or (2) a joint trial would "prevent the jury from making a reliable judgement about guilt or innocence." *United States v. Talley*, 108 F.3d 277, 280 (11th Cir. 1997) (quoting *Zafiro*, 506 U.S. at 539). Mutually antagonistic defenses do not justify severance unless "the essence of one defendant's defense [is] contradicted by a co-defendant's defense. . . ." *United States v. Cassano*, 132 F.3d 646, 652 (11th Cir. 1998) (citation and internal quotation marks omitted). "To warrant severance, defenses must be antagonistic to the point of being

irreconcilable or mutually exclusive." *Id.* (citation and internal quotation marks omitted). In *Zafiro*, the Court specifically recognized that limiting instructions "often will suffice to cure any risk of prejudice." *Talley*, 108 F.3d at 280.

In the instant case, Williamson and Faulk do not indicate how their defenses are antagonistic to or irreconcilable with those of the other defendants, nor do they establish that there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or show that a joint trial would prevent the jury from making a reliable judgment about guilt or innocence. The court has no basis on which to conclude that appropriate limiting instructions will not cure any risk of prejudice from a conflict among the defenses offered in a joint trial, if any such conflict occurs. Defendants' requests for severance are without merit.

V. Conclusion

For the foregoing reasons, it is

ORDERED that defendants' motions to supplement are GRANTED (Doc. ##121, 125), and the motions to sever, as supplemented (Doc. ##81, 82, 85 and 106) are DENIED.

DONE this 6th day of December, 2001.

/s/
SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

FILED
DEC 11 2001
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 01-106-N**
	)	
DWIGHT FAULK, et al.	)	

ORDER

For good cause, it is

ORDERED that the order (Doc. # 173) entered on December 6, 2001 be and hereby is VACATED.

DONE this 11th day of December, 2001.

/s/
SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

FILED
DEC 11 2001
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR NO. 01-106-N
	)	
DWIGHT FAULK, et al.	)	

ORDER AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Before the court are motions, to sever by defendants Williamson, Faulk, Jennifer McKee and Brian McKee. *See* Doc. ## 81, 82, 85 and 106; *see also* Doc. ## 121, 125 (motions to supplement motions to sever). For the reasons set out *infra*, the court concludes that the motions to sever are due to be denied.

Discussion

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Jennifer McKee argues that her trial should be severed from that of the other defendants under Fed.R.Crim.P. 8(b) and 14 on the ground: (1) that the indictment does' not properly allege that McKee participated in the same acts or transactions with other defendants; and (2) that the other defendants, who may choose not to take the stand in a joint trial, have made incriminating statements which may be offered against McKee without an opportunity for her to cross-examine.

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Though the defendants, other than Jennifer McKee, do not specify the rules under which they move for severance, the court assumes that they seek severance pursuant to Federal Rule of Criminal Procedure 14.[1] The court concludes that Rule

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[1]Jennifer McKee – and possible other defendants – also seek severance under Rule 8. "In contrast to a Rule 14 claim, which accepts that initial joinder is proper but asserts that a joint trial is prejudicial, a Rule 8(b) claim 'questions the propriety of joining two or more defendants in a single indictment in the first instance.'" *United States v. Wilson*, 894 F.2d 1245, 1252-53 (11th Cir. 1990) (citation omitted). The court

14 severance is not warranted in this case.

"There is a preference in the federal system for joint trials of defendants who are indicted together." *United States v. Talley*, 109 F.3d 277, 279 (11th Cir. 1997). "The burden is on the defendant to 'demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of his defense.'" *United States v. Schlei*, 1 122 F.3d 944, 984 (11th Cir. 1997). "(U]ndocumented, conclusory allegations are insufficient to meet the defendant's burden and "to overcome [the] strong circuit preference favoring joint trials." *United States v. Smith*, 918 F.2d 1551, 1561 (11" Cir. 1990); *see also United States v. Wingate*, 997 F.2d 1429, 1431 (11' Cir. 1993) (conclusory allegations insufficient). Defendants' general and conclusory allegations that joint "al would be prejudicial or unfair to defendants do not meet defendants' burden. Further, because inmost joint trials the evidence will implicate some participants to a greater extent than others, defendants fail to show compelling prejudice by showing some spillover of evidence. *United States v. Beale*, 921 F.2d 1412, 1428 (11" Cir. 1991). In this case the court has n reason to believe that the jury cannot independently evaluate the evidence against each defendant, follow the court's limiting instructions when

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with affidavits tending to suggest that a co-defendant possessed and was willing to share any exculpatory evidence was fatal to the motion); *see also United States. v. Beale,* 921 F.2d 1412, 1428-29 (Requiring affidavit from co-defendant stating the exact substance of his proffered testimony and the fact that he had actually agreed to testify). The court has no basis on which it may conclude that any co-defendant is willing to offer exculpatory testimony at Williamson's or Faulk's trials if severance is granted and, thus, the motion is due to be denied.

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In *Bruton,* the Supreme Court held that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a non-testifying co-defendant introduced is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant." *Richardson v. Marsh,* 481 U.S. 200, 208 (1987). *Richardson,* a subsequent Supreme Court ease, held that when a statement is not incriminating on its face, but becomes so only when linked with evidence introduced later at trial, the statement, need not be excluded provided it is redacted to eliminate nor only the defendant's name, but also any reference to his or her existence, and the jury is given a proper limiting instruction. *Id.* at 211; *see also Gray v. Maryland,* 523 U.S. 185 (1998) (redacted confession that refers directly to the existence of the non-confessing codefendant comes within *Bruton* rule).

The *Bruton* argument offered by McKee in her motion to sever is brief and general in nature, and she has not specifically pointed out which statements of co-defendants she contends are facially incriminating. In its response to defendants' motions to sever (Doc. # 136), the Government maintains that it "is familiar with the Supreme Court's holding in *Bruton* and has no intention of offering evidence that would violate the rule set forth in *Bruton*." Under these circumstances, the court cannot at this stage conclude that *Bruton* compels severance in this case.

IV. Antagonistic Defenses

Williamson and Faulk contend that their trial should be severed foci Brian McKee's trial because McKee's defense will be antagonistic to their defenses.

Mutually antagonistic defenses are not prejudicial per se. *Zafiro v. United* States, 506 U.S. 534, 538 (1993). The fact that defendant may have a better chance at acquittal if tried separately does not alone entitle him or her to severance. *Id.* at 540. In *Zafiro,* the Court held that, when defendants have been joined properly under Rule 8(b), the district court should grant Rule 14 severance only if (1) there exists "a serious risk that a joint trial would compromise a specific trial right of one of the defendants," or (2) a joint trial would "prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Talley,* 108 F.3d 277, 280 (11th Cir. 1997) (quoting *Zafiro,* 506 U.S. at 539). Mutually antagonistic defenses do not justify severance unless "the essence of one defendant's defense [is] contradicted by a co-defendant's defense. . . . " *United States v. Cassano,* 132 F.3d 646, 652 (filth Cir. 1998) (citation and internal quotation marks omitted). "To warrant severance, defenses must be antagonistic to the point of being irreconcilable or mutually exclusive." *Id.* (citation and internal quotation marks omitted). In *Zafiro,* the Court specifically recognized that limiting instructions "often will suffice to cure

any risk of prejudice." *Talley*, 108 F.3d at 280.

In the instant case, Williamson and Faulk do not indicate how their defenses are antagonistic to or irreconcilable with those of the other defendants, nor do they establish that there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or show that a joint trial would prevent the jury from making a reliable judgment about guilt or innocence. The court has no basis on which to conclude that appropriate limiting instructions will not cure any risk of prejudice from a conflict among the defenses offered in a joint trial, if any such conflict occurs. Defendants' requests for severance are without merit.

V. Conclusion

For the foregoing reasons, it is

ORDERED that defendants' motions to supplement are GRANTED (Doc. ## 121, 125). Further, it is the RECOMMENDATION of the Magistrate Judge that the motions to sever, as supplemented (Doc. ## 81, 82, 85 and 106), be DENIED.

DONE this 11th day of December, 2001.

/s/
SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of thirteen days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds plain grounds the adopted of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities. Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 31, 1981.

DONE this 11th day of December, 2001.

/s/
SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

FILED
DEC 12 2001
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
DWIGHT FAULK	)	

ORDER

The Government having indicated that it will not use any *Bruton* evidence, it is ORDERED that the motion to exclude *Bruton* evidence, or in the alternative, motion in *limine*, filed by defendant Dwight Faulk on August 2, 2001 (doc. no. 58), is denied.

DONE, this the 12th day of December, 2001.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

FILED
DEC 12 2001
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
LINDA WILLIAMSON	)	
aka LINDA WEST	)	

ORDER

The Government having indicated that it will not use any *Bruton* evidence, it is ORDERED that the motion to exclude *Bruton* evidence, or in the alternative, motion in limine, filed by defendant Linda Williamson on August 2, 2001 (doc. no. 74), is denied.

DONE, this the 12th day of December, 2001.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
DWIGHT FAULK, BRIAN MCKEE,	)	
JENNIFER MCKEE, and	)	
LINDA WILLIAMSON	)	

ORDER

Upon consideration of the recommendation of the United States Magistrate Judge, entered on December 10, 2001 (Doc. no. 182), to which no objection has been filed, and after an independent review of the file, it is ORDERED as follows:

(1) The recommendation of the United States Magistrate Judge, entered on December 11, 2001 (Doc. no. 182), is adopted.

(2) The following motions, as supplemented, are denied: motion to sever, filed by defendant Linda Wi11iamson on August 3, 2001 (Doc. no. 81) ; motion to sever, filed by defendant Dwight Faulk on August 3, 2001 (Doc. no. 82); motion to sever, filed by defendant Jennifer McKee on August 3, 2001 (Doc. no. 85) ; and motion to sever, filed by defendant Brian McKee on August 3, 2001 (Doc. no. 106).

DONE, this the 3rd day of January, 2002.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

FILED
FEB 13 2002
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
DWIGHT FAULK	)	
LINDA WILLIAMSON a/k/a	)	
LINDA WEST	)	

ORDER

It is ORDERED that the joint motion for new trial, filed by defendants Dwight Faulk and Linda Williamson on January 29, 2002 (Doc. No. 278), is denied.

DONE, this the 13th day of February, 2002.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

FILED
JAN 11 2002
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
DWIGHT FAULK, BRIAN MCKEE, and LINDA WILLIAMSON	)	

ORDER

The court has considered the recommendation of the United States Magistrate Judge, entered on December 10, 2001 (Doc. no. 178), and the objections filed by defendant Brian McKee on December 27, 2001 (Doc. no. 193), and defendant Dwight Faulk on December 20, 2001 (Doc. no. 190), and has made an independent review of the file. Accordingly, it is ORDERED as follows:

(1) The recommendation of the United States Magistrate Judge, entered on December 10, 2001 (Doc. no. 178), is adopted.

(2) The following motions are denied: motion for leave of court to file motion to supplement, filed by defendant Dwight Faulk on November 30, 2001 (Doc. no 165); motion to supplement, filed by defendant Dwight Faulk on November 30, 2001 (Doc. no. 166); motion for leave of court to file motion to supplement, filed by defendant Linda Williamson on

November 30, 2001 (Doc. no. 167); motion to supplement, filed by defendant Linda Williamson on November 30, 2001 (Doc. no. 168); motion for leave of court to file motion to supplement, filed by defendant Brian McKee on December 6, 2001 (Doc. no. 174); and motion to supplement, filed by defendant Brian McKee on December 6, 2001 (Doc. no. 175).

DONE, this the 11th day of January, 2002.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

FILED
MAR 6 2002
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF

IN THE DISTRICT COURT OF UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
DWIGHT FAULK, BRIAN MCKEE,	)	
LINDA WILLIAMSON a/k/a	)	
LINDA WEST	)	

ORDER

It is ORDERED that the objections and exceptions, etc., filed by defendants Dwight Faulk, Linda Williamson, and Brian McKee on February 14 and 19, 2002 (Doc. Nos. 293 & 295), are overruled.

The defendants confuse the issue of the admissibility of a defendant's own statement against himself or herself, Fed.R.Evid. 801 (d)(2)(A); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968), with the issue of the admissibility of a statement of a "co-conspirator" against other parties in the conspiracy during the course and in furtherance of the conspiracy, Fed.R.Evid. 801 (d)(2)(E); *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987); *United States v. Hewes*, 729 F.2d 1302, 1312 (11th Cir. 1984). In the order issued on February 5, 2002 ((Doc. No. 284), the court addressed only the latter issue.

DONE, this the 6th day of March, 2002.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

FILED
MAY 22 2002
CLERK
U.S. DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
BRIAN MCKEE, DWIGHT FAULK, JENNIFER MCKEE, and LINDA WILLIAMSON a/k/a LINDA WEST)	)	

SUPPLEMENTAL OPINION

During argument before the court on the question of whether the defendants should be released pending appeal, counsel for defendants Dwight Faulk and Linda Williamson again cited *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968), for the proposition that a defendant is deprived of his rights under the confrontation clause when his nontestifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the co-defendant. However, counsel failed, as he repeatedly did throughout the trial, to note that *Bruton's* reach was later limited by the Supreme Court in the case of *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987), where the Court expressly held that there is no *Bruton* violation (1) by the admission of a non-testifying codefendant's confession (2) with a proper limiting instruction (3) when the confession is redacted to eliminate reference to the defendant and (4) even

though the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial. And this is true even though the confession, in the words of both the *Marsh* majority and dissenters, is "powerfully incriminating," *id.* at 206, 107 S.Ct. at 1706 (Scalia, J, majority opinion); *id.* at 214, 107 S.Ct. at 1711 (Stevens, J, dissenting), and, as the dissenters critically described, the incriminating inference to be drawn from the linking evidence is "certain." *Id.* at 215, 107 S.Ct. at 1711 (Stevens, J, dissenting).

The Court explained that where "the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial, . . . it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Id.* at 208, 107 S.Ct. at 1707-1708. The Court further explained as follows:

> "Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction—a possibility suggested in that opinion itself. *Id.*, at 134, n. 10, 88 3.Ct., at 1626, n.10. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. The contextual implication' doctrine articulated by the Court of Appeals would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so 'powerfully incriminating' that a new, separate trial is required for the defendant. This obviously

lends itself to manipulation by the defense—and even without manipulation will result in numerous mistrials and appeals. It might be suggested that those consequences could be reduced by conducting a pretrial hearing at which prosecution and defense would reveal the evidence they plan to introduce, enabling the court to assess compliance with *Bruton ex ante* rather than *ex post.* If this approach is even feasible under the Federal Rules (which is doubtful—*see, e.g.,* Fed.RuleCrim.Proc. 14), it would be time consuming and obviously far from foolproof. One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system, *accounting* for almost one third of federal criminal trials in the past five years. . . . Many joint trials—for example, those involving large conspiracies to import and distribute illegal drugs—involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace—-and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected, by his own silence. It would impair both the efficiency *and* the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the

> inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. The other way of assuring compliance with an expansive *Bruton* rule would be to forgo use of codefendant confessions. That price also is too high, since confessions 'are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.' *Moran v. Burbine*, 475 U.S. 412, 426, 106 S.Ct. 1135, 1143, 89 L.Ed.2d 410 (1986) (citation omitted)."

Id. at 208-210, 107 S.Ct. at 1708-1709 (citations omitted).

DONE, this the 22nd day of May, 2002.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE